

IN THE UNITED STATES BANKRUPTCY COURT  
FOR THE  
SOUTHERN DISTRICT OF GEORGIA  
Dublin Division

IN RE:	)	Chapter 13 Case
	)	Number <u>91-30126</u>
GEORGE C. FOSKEY	)	
LINDA JOYCE FOSKEY	)	
	)	FILED
Debtors	)	at 11 O'clock & 26 min. A.M.
_____	)	Date: 10-8-91
	)	
GEORGE C. FOSKEY	)	
LINDA JOYCE FOSKEY	)	
	)	
Plaintiffs	)	
	)	
vs.	)	Adversary Proceeding
	)	Number <u>91-3004</u>
CITIZENS & SOUTHERN	)	
NATIONAL BANK	)	
	)	
Defendant	)	

**ORDER**

Debtors, George C. Foskey and Linda Joyce Foskey brought this adversary proceeding against Citizens and Southern National Bank ("C & S") to recover property pursuant to 11 U.S.C. §542. Based upon the evidence presented at trial and relevant legal authorities, I make the following findings.

**FINDINGS OF FACT**

This adversary proceeding arises out of C & S's repossession of two vehicles, a 1990 Ford F-150 pickup truck and a 1990 Ford Ranger pickup truck, in which debtors claim an ownership

interest. Mr. Foskey is self-employed and used the trucks in his business and for personal transportation for him and his family.

C & S financed the purchase of the trucks pursuant to a retail installment sale contract executed by debtors in connection with the purchase of each truck ("installment agreements" or "loans"). The installment agreement on the Ford 150 truck required a monthly payment of Three Hundred One and 42/100 (\$301.42) Dollars on the twenty-second (22nd) day of each month. The installment agreement on the Ford Ranger truck required a monthly payment of One Hundred Ninety-Nine and 93/100 (\$199.93) Dollars on the eighth (8th) day of each month. Each installment agreement contained the following provision:

DEFAULT, ACCELERATION AND REMEDIES: (1) The occurrence of any one of the following shall constitute a default hereunder: (a) Buyer fails to pay when due any installment or debt secured hereby. . . .  
(2) In the event of a default under any of the subheadings of the immediately preceding subsection . . . [C & S] may exercise all rights and remedies available under applicable law and this contract. Without limitation of its rights and remedies, [C & S] may take the Property into its own possession by such means (without breach of the peace) and through agents or otherwise as it shall elect, and sell, lease, or otherwise dispose of the Property . . . so long as the same is commercially reasonable.

Debtors fell behind on their payments to C & S. Computer printouts of debtors' payment history with C & S show that through the end of March, 1991, a payment of One Hundred Ninety-Nine and 93/100 (\$199.93) Dollars on the Ford Ranger truck was 21 days past

due, and a payment of Three Hundred one and 42/100 (\$301.42) Dollars on the Ford F-150 truck was 66 days past due.

During the latter part of February, 1991, debtors attempted to bring current their accounts with C & S by mailing two checks: one dated February 26, 1991 for Three Hundred One and 42/100 (\$301.42) Dollars; the other dated February 27, 1991 also for Three Hundred One and 42/100 (\$301.42) Dollars. The drawer printed on the face of each check is "Home Improvements of Georgia P. O. Box 1333 Lyons, Georgia 30436"; handwritten above that is "George Foskey." Neither check bears any account or loan number identifying the loan to which each check applied. C & S returned the checks to debtors with a remittance notice indicating the checks were returned because C & S could not identify the loan transaction. A C & S representative testified that C & S normally returns payments tendered by its customers without a loan coupon or account number written on the face of the check identifying the loan transaction for which payment is made. Debtors were under the impression that the two checks would bring them current.

On the night of March 29, 1991, C & S repossessed both vehicles. On April 1, 1991 debtors filed a joint Chapter 13 bankruptcy petition in this court. On April 2, 1991 C & S sent notice to both debtors individually by certified mail return receipt requested to their address as reflected in C & S's records<sup>1</sup> of its

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<sup>1</sup>Route 1 Box 110C, Ailey, Georgia 30410.

intention to sell the trucks within ten days. The 10-day sale notification letter sent each debtor clearly set forth C & S's intention to pursue a deficiency claim, debtors' redemption rights in the vehicles to pay the debt in full prior to sale, as well as debtors' right to demand public sale.<sup>2</sup> The Postal Service issued postal notices on April 3, 8 and 18, 1991. Debtors never picked up the two 10-day sale notice letters. The letters were returned to C & S marked "unclaimed" on April 19, 1991. The trucks were sold at auction on April 15, 1991 with a resulting deficiency balance. C & S received notice of debtors' bankruptcy filing on April 18, 1991.

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<sup>2</sup>The letter read in part as follows:

This is our notice to you that on or after 4/12/91 we intend to dispose of this collateral by a private sale. In the event the proceeds from the sale of this collateral do not satisfy your indebtedness to us, you will be liable for any remaining balance.

You may redeem this collateral by paying your indebtedness in full any time prior to sale of vehicle [sic]. By law, you are entitled to a public sale of this collateral, provided we are notified that you desire this sale by registered or certified mail within ten days of the date of this letter.

In the event you wish a public sale, the cost of advertising for two weeks in the local newspaper, a description of the collateral and your name as registered owner, along with all other costs incurred with this sale, will necessarily have to be charged to your account.

## CONCLUSIONS OF LAW

Debtors contend C & S violated state law in repossessing and disposing of debtors' two trucks. Georgia law provides that a secured party has the right to conduct self-help repossession of its collateral upon the debtor's default so long as no breach of the peace occurs. Official Code of Georgia Annotated (O.C.G.A.) §11-9-503. In this case the validity of C & S's security interest is not disputed and there was no breach of the peace caused by the repossession. Section 11-9-503 does not define "default." Default is determined by the terms of the security agreement itself. Whisenhunt v. Allen Parker Co., 168 S.E.2d 827, 830 (Ga. App. 1969). See e.g., Trust Co. Bank v. Johnson, 239 S.E.2d 542 (Ga. App. 1977); Hardwick, Cook & Co. v. 3379 Peachtree Ltd., 363 S.E.2d 31 (Ga. App. 1987). The installment agreements in this case provided that default occurred if debtors failed timely to make a monthly payment.<sup>3</sup> Computer printouts of debtors' payment history with C & S on the two loans and testimony presented at hearing show that payment on each loan was past due in March, 1991. Debtors attempted

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<sup>3</sup>The installment agreements were not introduced as evidence at hearing. C & S submitted copies of the installment agreements with its proof of claim, which are part of the underlying Chapter 13 case. The court may take judicial notice of the file in the underlying bankruptcy case. In re: Jackson, 49 B.R. 298 (Bankr. Kan. 1985); In re: Hatcher, Ch. 13 Case No. 89-10834 (Bankr. S.D. Ga. Dalis, J. March 14, 1990); In re: Moraetes, Ch. 13 Case No. 88-11384 (Bankr. S.D. Ga. Dalis, J. June 6, 1989). See also Allen v. Newsome, 795 F.2d 934 (11th Cir. 1986) (district court may take judicial notice of prior habeas corpus applications filed by petitioner in proceeding on habeas corpus petition).

to make two payments which the debtors contend would have brought them current, but C & S returned the checks because debtors failed to identify how C & S was to credit the payment. Not only did debtors fail to identify the loans, the printed drawer on each check was "Home Improvements of Georgia." C & S could not have determined how to credit the payment and was not obligated to accept either check as tendered. Debtors were in default and C & S had the right to repossess the two trucks pursuant to O.C.G.A. §11-9-503.

Having repossessed the collateral, C & S had the right as a secured party to dispose of the collateral in a commercially reasonable manner. O.C.G.A. §11-9-504(1), (3). However, C & S's right to dispose of the vehicles was subject to debtors' rights of redemption under O.C.G.A. §11-9-506. Georgia law protects a debtor's rights of redemption by requiring that the creditor meet certain notification requirements, O.C.G.A. §§11-9-504(3), 10-1-36, before selling the collateral. O.C.G.A. §11-9-504(3) requires that

reasonable notification of the time and place of any public sale or reasonable notification of the time after which any private sale or other intended disposition is to be made shall be sent by the secured party to the debtor, if he has not signed after default a statement renouncing or modifying his right to notification of sale.

O.C.G.A. §10-1-36 provides in pertinent part:

When any motor vehicle has been repossessed after default in accordance with Part 5 of Article 9 of Title 11, the seller or holder shall not be entitled to recover a deficiency against the buyer unless within ten days after the repossession he forwards by registered or

certified mail to the address of the buyer shown

on the contract or later designated by the buyer a notice of the seller's or holder's intention to pursue a deficiency claim against the buyer. The notice shall also advise the buyer of his rights of redemption, as well as his right to demand a public sale of the repossessed motor vehicle.

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This Code section is cumulative of Part 5 of Article 9 of Title 11 and provides cumulative additional rights and remedies which must be fulfilled before any deficiency claim will lie against a buyer, and nothing herein shall be deemed to repeal said part.

A secured creditor's failure to comply with state law in disposing of repossessed collateral may preclude the creditor from recovering a deficiency, O.C.G.A. §10-1-36, or may entitle the debtor to damages. O.C.G.A. §11-9-507(1).

C & S sent a separate letter via certified mail return receipt requested to each debtor at debtors' last known address; the contents of which clearly complied with the requirements of O.C.G.A. §10-1-36.<sup>4</sup>

Debtors contend, however, that C & S failed to comply with Georgia law notification requirements because the sale of the vehicles on April 15, 1991 occurred before the notification letters sent debtors were returned unclaimed to C & S on April 19, 1991. Debtors contend C & S did not act in good faith in selling the trucks before receiving the unclaimed letters. While it is true that Georgia law imposes a requirement of good faith on any creditor

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<sup>4</sup>See note 2, supra, for the text of the notification letter sent each debtor.

disposing of repossessed collateral, O.C.G.A. §11-1-203,<sup>5</sup> debtors have not shown that C & S did not act in good faith. Debtors contend C & S should have waited until it received the unclaimed notification letters before proceeding with sale. Under the Georgia Commercial Code, however, there was no requirement that C & S wait and debtors cite no authority which supports their argument that C & S should have waited. Furthermore, "[t]here is no requirement in O.C.G.A. §10-1-36 that the debtor actually receive notice." Calcote v. Citizens and Southern Nat. Bank, 345 S.E.2d 616, 618 (Ga. App. 1986) (holding proper notice via certified mail to the appropriate address is all that is needed to comply with O.C.G.A. §10-1-36). Accord Veitch v. Nat. Bank of Georgia, 283 S.E.2d 686 (Ga. App. 1981). C & S fully complied with O.C.G.A. §10-1-36. Although strict compliance with O.C.G.A. §10-1-36 will not automatically satisfy the additional "reasonable notification" requirement of O.C.G.A. §11-9-504(3), see Geohagan v. Commercial Credit Corp., 204 S.E.2d 784 (Ga. App. 1974), C & S gave "reasonable notification" in this case. C & S did all that it should reasonably be required to do to apprise debtors of their rights in the vehicles and cannot be held responsible for debtors' failure to retrieve their mail. Cf. Calcote, supra. C & S acted in good faith and, having complied with state law in disposing of the collateral, C &

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<sup>5</sup>O.C.G.A. §11-1-203 provides: "Every contract or duty within this title imposes an obligation of good faith in its performance or enforcement."

S retains its right to collect from debtors the deficiency balance after sale.

Mere compliance with state law does not prevent turnover under federal law, the Bankruptcy Code. The Bankruptcy Code requires that property of the estate be delivered to the bankruptcy trustee unless the property has no value or is of no benefit to the estate. 11 U.S.C. §542(a). Section 542(a) provides

Except as provided in subsection (c) or (d) of this section, an entity, other than a custodian, in possession, custody, or control, during the case, of property that the trustee may use, sell, or lease under section 363 of this title, or that debtor may exempt under section 522 of this title, shall deliver to the trustee, and account for, such property or the value of such property, unless such property is of inconsequential value or benefit to the estate.

11 U.S.C. §542(a) (emphasis added).

In defense of debtors' §542(a) turnover action, C & S argues 1) that the vehicles in question were not property of the estate when sold because the prepetition repossession extinguished debtors' ownership interests; 2) that the vehicles are of inconsequential value or benefit to the estate; 3) that the vehicles have been sold and the proceeds are of no benefit to estate; and 4) that C & S is entitled to retain the proceeds under §542(c).

Section 541 defines property of the estate and provides under subsection (a)

The commencement of a case under section 301, 302 or 303 of this title creates an estate. Such estate is comprised of the following property, wherever located and by whomever held:

(1) Except as provided in subsections (b) and (c)(2) of this section, all legal or equitable interests of the debtor in property as of the commencement of the case.

11 U.S.C. §541(a)(1).

Property of the estate under §541(a)(1) includes property repossessed prepetition. United States v. Whiting Pools, Inc., 462 U.S. 198, 103 S.Ct. 2309, 76 L.E.2d 515 (1983);<sup>6</sup> Blackmon v. MFC Financial Services (In re: Blackmon), Ch. 13 Case No. 91-10089 Adv. 91-1009 (Bankr. S.D. Ga. Dalis, J. March 22, 1991). The debtor need not hold a possessory interest in property for it to come within §541(a)'s definition of property of the estate. Whiting Pools, supra, 103 S.Ct. at 2314. See also In re: Attinello, 38 B.R. 609 (Bankr. E.D. Pa. 1984); In re: Radden, 35 B.R. 821 (Bankr. E.D. Va. 1983); Matter of Willis, 34 B.R. 451 (Bankr. M.D. N.C. 1983). At the time debtors filed their joint Chapter 13 petition, they retained an interest in the equity of redemption in the trucks. Their rights of redemption constitute property of the estate under §541(a) subject to turnover. In re: Anderson, 29 B.R. 563 (Bankr. E.D. Va. 1983). See also In re: Bialac, 712 F.2d 426 (9th Cir.

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<sup>6</sup>Whiting Pools involved a Chapter 11 case. Although, as C & S correctly points out, the Supreme Court expressed no opinion as to whether 542(a) should be construed just as broadly in a Chapter 7 or Chapter 13 case as in a Chapter 11 case (see n.17), the Court's reasoning is equally applicable to this Chapter 13 case where the debtors testified that the collateral is essential to a successful Chapter 13 rehabilitation. In re: Attinello, 38 B.R. 609, 611 (Bankr. E.D. Pa. 1984); In re: Robinson, 36 B.R. 35, 37-38 (Bankr. E.D. Ark. 1983); In re: Radden, 35 B.R. 821 (Bankr. E.D. Va. 1983).

1983 ; In re: Gerwer, 898 F.2d 730 (9th Cir. 1990); Blackmon, supra.

In this case, however, the vehicles have been sold to good faith purchasers for value and are no longer subject to turnover. In re: Ford Concepts, 85 B.R. 893, 895-96 (Bankr. S.D. Fla. 1988). However, debtors' bankruptcy estate includes "[p]roceeds, product, offspring, rents, or profits of or from property of the estate. . . ." 11 U.S.C. §541(a)(6). Debtors are therefore entitled to use the proceeds from the sale of the trucks to acquire replacement transportation. Debtors testified that the trucks were an integral part of Mr. Foskey's business and essential to his ability to generate income sufficient to fund debtors' Chapter 13 plan. C & S's argument that the vehicles would be of no benefit to the estate is not supported by the evidence. Debtors must have adequate transportation to successfully complete their Chapter 13 plan. Debtors presented un rebutted testimony that their current transportation is unreliable. C & S's contention that the proceeds would not benefit the estate is groundless. Debtors are entitled to the proceeds in order to purchase dependable, replacement transportation. Cf. In re: Smith, 86 B.R. 92 (Bankr. W.D. Mich. 1988), aff'd in part rev'd in part, 876 F.2d 524 (6th Cir. 1989). C & S also argues that under 11 U.S.C. §542(c),<sup>7</sup> the

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<sup>7</sup>Section 542(c) provides:

Except as provided in section 362(a)(7) of this title, an entity that has neither actual notice nor actual knowledge of the commencement of the case concerning the debtor may transfer

proceeds are not subject to turnover since C & S had no notice of debtors' bankruptcy petition at the time of the foreclosure sale. Section 542(c) codifies the U.S. Supreme Court's holding in Bank of Marin v. England, 385 U.S. 99, 87 S.Ct. 274, 17 L.E.2d 197 (1966),<sup>8</sup> that a bank acting without notice or actual knowledge of a depositor's bankruptcy could not be held liable for honoring the depositor's checks post petition. Nothing in Marin or §542(c) suggests that where the post petition transferor receives payment in connection with a foreclosure sale of property of the estate, the proceeds retained are not subject to turnover. See Smith, supra, 876 F.2d 524 (proceeds from a post petition sale of collateral repossessed prior to bankruptcy held subject to turnover even though the creditor had no notice of the bankruptcy at the time of sale). The debtors having established by a preponderance of the evidence that the estate held a property interest in the sale proceeds at the time of filing and C & S having failed to establish that the proceeds are exempt from turnover, C & S must surrender to debtors the proceeds from the sale of the two trucks. C & S will retain a lien to the extent of the proceeds against the replacement vehicle

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property of the estate, . . . in good faith . . . to an entity other than the trustee, with the same effect as to the entity making such transfer of payment as if the case under this title concerning the debtor had not been commenced.

<sup>8</sup>H. R. Rep. No. 595, 95th Cong., 1st Sess. 369 (1977); Senate Report No. 95-989, 95th Cong., 2d Sess. 84 (1978).

purchased.

Because debtors' estate retained an interest in the two vehicles at the commencement of the bankruptcy case, C & S violated the automatic stay of 11 U.S.C. §362 by proceeding with foreclosure sale of property of the estate. Section 362(a) provides for an automatic stay against, among other things, "any act to obtain possession of property of the estate or of property from the estate or to exercise control over the property of the estate." 11 U.S.C. §362(a)(3). However, C & S committed only a technical violation of the stay. As C & S had no notice of debtors' bankruptcy filing at the time of the sale, the stay violation was not "willful" and damages under §362(h) are not appropriate.

It is therefore ORDERED that C & S surrender the amount of the proceeds from the sale of the Ford F-150 and Ford Ranger pickup trucks to the debtors;

further ORDERED that debtors purchase with the proceeds a vehicle for use in debtors' business with a fair market value of not less than the amount of the proceeds within 30 days of receipt of the proceeds;

further ORDERED that debtors transfer title to the replacement vehicle purchased to C & S as first lienholder;

further ORDERED that debtors purchase and maintain insurance on the vehicle purchased as required under the installment agreements and provide C & S with proof of coverage at the time debtors transfer title;

further ORDERED that C & S amend its proof of claim to reflect a secured claim to the extent of the proceeds and an unsecured claim for the outstanding deficiency balance on the sale of the two trucks.

JOHN S. DALIS  
UNITED STATES BANKRUPTCY JUDGE

Dated at Augusta, Georgia  
this 7th day of October, 1991.